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Normal for Whom? Gender Acculturation in Native American Communities

Cover Page Footnote

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NORMAL FOR WHOM? GENDER ACCULTURATION IN NATIVE AMERICAN COMMUNITIES

Gender is so basic to our cultural coding that people often have difficulty accepting that women are not innately more timid or men more brazen. Gender is difficult to see while looking at only one's own culture; through comparative inquiry, however, gender reveals itself to be a social construct.

When Europeans came to North America they found a population with completely different traditions and religious beliefs from their own. Among the differences were vastly disparate conceptions of gender and sexuality. European's social treatment of gender and sexuality is rooted in the Judeo-Christian tradition; Native American cultures grounded their social opinions of gender and sexuality in their own religious teachings. Yet, today, when Native American communities confront issues of gender and sexuality in the context of gay marriage, tribal leaders respond like Christian Europeans. Is this just benign acculturation implemented through assimilation of the aboriginal population into western European, Judeo-Christian culture, or is it more specific and purposeful?

Part I of this comment chronicles the events following Dawn McKinley and Kathy Reynolds' filing of a marriage application with their tribe in 2004. The tribal leadership's response shows the animosity towards same-sex couples present in the Cherokee Nation of Oklahoma of today. Part II provides a brief summary of the gender systems that existed in the aboriginal cultures of North America prior to European settlement, demonstrating how different these traditions were from the Judeo-Christian belief system. Part III discusses some of the major interactions between the federal government & tribes, particularly as those interactions demonstrate the federal government's polemic relationship with Native Americans' cultural heritage.

Part IV concludes that federal actions contributed to the divide between the current and past cultural conditions in tribal culture.

INTRODUCTION: TODAY'S NATIVE AMERICAN COMMUNITIES

In May of 2004, a Cherokee couple, Dawn McKinley and Kathy Reynolds, went to the tribal clerk's office and picked up a marriage application, tipping off a flurry of activity in every branch of tribal governance, and a court battle that is still unresolved.¹ This part first looks at the legal actions taken in response to the women's marriage. Second, this part looks at tribal leaders' statements about the marriage, revealing their impressions of the meaning of marriage in their tribes.

A. *Legal Actions in Response to Same-Sex Marriage*

McKinley and Reynolds have faced a series of negative responses from the tribal government and influential tribe members since they picked up their marriage application. On May 14, 2004, one day after they received their marriage application, Chief Justice Darrell Dowty of the tribe's highest court, the Judicial Appeals Tribunal ("JAT"),² issued a thirty-day moratorium prohibiting the issuance of any further marriage

¹ Sheila Stogsdill & Judy Gibbs Robinson, *Cherokees Working to Ban Gay Vows: Lesbian Couple Obtain Tribal Marriage Application*, DAILY OKLAHOMAN, May 16, 2004, at 1A (discussing marriage application and initial judicial moratorium and legislative actions). See also S.E. Ruckman, *Third Challenge Filed to Tribal Same-Sex Marriage*, TULSA WORLD, Mar. 4, 2006, at A12 (announcing initiation of third lawsuit); *Case Docket: Reynolds & McKinley*, NATIONAL CENTER FOR LESBIAN RIGHTS, [hereinafter "*NCLR Docket*"], http://www.nclrights.org/site/PageServer?pagename=issue_caseDocket_reynolds (last visited Feb. 29, 2012).

² The Judicial Appeals Tribunal is the tribe's highest court of appeals. See CHEROKEE NATION JUDICIAL BRANCH, www.cherokeecourts.org (last visited Feb. 26, 2012). The Court was renamed by tribal constitutional amendment in 1999 to the "Supreme Court." *History of the Supreme Court*, CHEROKEE NATION JUDICIAL BRANCH, <http://www.cherokeecourts.org/History/History-oftheSupremeCourt.aspx> (last visited Feb. 26, 2012). News articles and documents refer to the court as the "Judicial Appeals Tribunal" until sometime after 2006. This article follows that nomenclature.

applications to same-sex couples.³ Principal Chief Chad Smith also “asked tribal lawyers to look into the tribe’s marriage policy.”⁴

On June 14, 2004, one month after the women obtained their marriage application, the Cherokee Nation’s Tribal Council unanimously passed a law permanently banning any other same-sex couples from obtaining a tribal marriage application.⁵ Since Reynolds and McKinley already had their marriage application, the amendment passed by the Tribal Council would not prevent the couple from filing their marriage application.⁶ Yet they might not be legally married until they file their marriage application,⁷ a feat that they have been continuously prevented from achieving.⁸ Initially, the Chief Justice’s thirty-day moratorium prevented the women from being able to file their marriage application.⁹ Since the moratorium expired, lawsuits have prevented the couple from filing their marriage application because it cannot be filed while a lawsuit contesting the marriage is pending.¹⁰

Lawsuits contesting the marriage have been pending almost continuously since the women obtained their marriage application. The first two suits were both dismissed for lack of standing, but the third is still pending as of this comment’s publication.¹¹ This sub-part looks at the circumstances surrounding each of the lawsuits in turn.

³ Stogsdill, *supra* note 1, at 1A; Sheila K. Stogsdill, *Cherokees Extend Marriage Restriction*, DAILY OKLAHOMAN, June 19, 2004, at 9A, 14A; S. E. Ruckman, *Tribe Nixes Bids for Same-Sex Marriages*, TULSA WORLD, May 18, 2004, at A9.

⁴ Stogsdill, *supra* note 1, at 1A.

⁵ Stogsdill, *supra* note 3, at 9A.

⁶ *Id.*

⁷ Stogsdill, *supra* note 1, at 1A; *see also* 25 CFR § 11.600(b)(1) (2010) (seemingly requiring all of application, ceremony, and recording for valid tribal marriage).

⁸ Stogsdill, *supra* note 3, at 14A.

⁹ Kelly Kurt, *Tribal Court to Consider Marriage: Lesbian Couple Seek Recognition of their Union*, DAILY OKLAHOMAN, May 19, 2005, at 14A.

¹⁰ *See* Ruckman, *supra* note 1, at A12.

¹¹ NCLR Docket, *supra* note 1.

On June 11, 2004, less than one month after the women's marriage, Todd Hembree, in his individual capacity, filed a lawsuit requesting an injunction against the marriage of McKinley and Reynolds.¹² Because the Tribal Council amended the tribe's marriage law around the same time that Hembree filed suit, it became clear that his suit would affect only McKinley and Reynolds.¹³ Regardless, Hembree maintained the suit, explaining "I just don't want the validity of Cherokee law to be in question or made a mockery of."¹⁴ The couple's first wedding anniversary came and went while they were still embroiled in defending against Hembree's lawsuit, still unable to officially file their marriage application.¹⁵

On August 3, 2005, the JAT's three-justice panel dismissed Hembree's lawsuit for lack of standing.¹⁶ The JAT held that Hembree failed to show that he would individually be harmed if the women were allowed to file their marriage application.¹⁷ In response to the dismissal, Hembree told the press that he still believed that same-sex marriage violated the Cherokee Nation's constitution, and he hoped that the Cherokee Nation would intervene.¹⁸

Two days later, on August 5, 2005, a group of tribal councilors filed their own lawsuit, using the same arguments Hembree had advanced, trying to block McKinley and Reynolds from recording their marriage.¹⁹ This time, Hembree *represented* the group of nine tribal councilors.²⁰ The six other council members de-

¹² Stogsdill, *supra* note 3, at 14A.

¹³ *See id.*

¹⁴ Kurt, *supra* note 9, at 14A.

¹⁵ *Id.*

¹⁶ Sheila K. Stogsdill, *Tribes: Cherokee Attorney Loses: Court Dismisses Lawsuit Over Women's Marriage*, DAILY OKLAHOMAN, Aug. 4, 2005, at 11A.

¹⁷ *Id.* *See also* Tahlequah—Same-Sex Marriage is Opposed, DAILY OKLAHOMAN, Aug. 10, 2005, at 11A.

¹⁸ *See* Stogsdill, *supra* note 16, at 11A.

¹⁹ *Tahlequah—Same-Sex Marriage is Opposed*, *supra* note 17, at 11A.

²⁰ *Cherokee High Court Rules in Favor of NCLR and Same Sex Couple* (Jan. 4, 2006), NATIONAL CENTER FOR LESBIAN RIGHTS, [hereinafter *NCLR Press Release 2006*], http://www.nclrights.org/site/PageServer?pagename=issue_

clined to participate.²¹ The nine council members claimed to have standing to file the petition in their official capacity; the JAT did not agree.²² On December 22, 2005, the JAT dismissed the council-member's lawsuit for the same standing defect that caused Hembree's lawsuit to fail²³—namely, that the tribal councilors failed to show that they would be personally harmed by the marriage's recognition.²⁴

Early in 2006, less than a month after the council members' suit was dismissed, the Cherokee Nation's court administrator (a position similar to a county clerk), filed a third lawsuit.²⁵ This time, it was a petition for a declaratory judgment, asking the JAT to relieve the administrator of responsibility for filing the women's marriage certificate in case they again tried to have it officially recorded.²⁶ Her official duties include filing marriage applications in compliance with tribal law.²⁷ The court administrator's attorney explained that they hoped this official duty would get her case past the standing issue.²⁸ Her position was that, even before the Tribal Council clarified its marriage statute in 2004, the law had not intended to recognize same-sex marriages.²⁹ Thus, she believed that filing the application would be a violation of tribal law. The tribal administrator's suit is still pending as of January 2012,³⁰ seven years after McKinley and Reynolds picked up their marriage application from the court clerk with little fanfare. Currently, the lawsuit seems destined to remain abandoned on the tribal docket, which will continuously prevent McKinley and Reynolds from filing their marriage application.

caseDocket_reynolds (follow "Read NCLR's press release 01.04.06" hyperlink).

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ Ruckman, *supra* note 1, at A12.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *See id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *NCLR Docket, supra* note 1.

B. Leaders' Statements in Response to Same-Sex Marriage

While the couple's marriage has been in legal limbo within the Cherokee Nation, neighboring tribes have also reconsidered their own marriage laws.³¹ Nearby, Creek Nation's and Iowa Tribe's laws already specifically excluded same-sex marriages from tribal recognition.³² A few other tribes acknowledged that their laws made no mention of same-sex marriage at all.³³ The Muscogee Nation, for example, had no official stance on same-sex marriage in 2004.³⁴ The Navajo Nation passed legislation that would have banned same-sex marriage on its reservation but the Navajo Nation's president vetoed the provision.³⁵

While the tribes reacted differently, tribal leaders in Oklahoma overwhelmingly seemed to agree that same-sex marriage had no place in tribal culture or tribal courts.³⁶ For example, one tribal leader, who served at various times as a Supreme Court Justice for two different tribes and as general counsel for three other tribes, told Tulsa reporters, "I think the events of the non-Indian world are bringing [same-sex marriage] to the forefront."³⁷ He expressed "doubts that same-sex marriage had ever been an issue among any of the five tribes he serves."³⁸ Hembree, at the time that he filed the first lawsuit, told reporters that no other tribes allowed same-sex marriages either.³⁹ The Chero-

³¹ Sheila K. Stogsdill & Tony Thornton, *Tribes Mull Their Laws on Marriage*, DAILY OKLAHOMAN, May 18, 2004, at 3A.

³² *Id.*

³³ *Id.*

³⁴ Ruckman, *supra* note 3, at A9.

³⁵ Kurt, *supra* note 9, at 14A (The legal debate is moot for some tribes because many of the thirty-eight federally-recognized tribes in Oklahoma such as the Choctaw Nation do not issue marriage licenses at all.); Stogsdill, *supra* note 31, at 3A. See also Ruckman, *supra* note 3, at A9.

³⁶ See David Zizzo, *Marriage Could, Force High Court Decision*, DAILY OKLAHOMAN, June 27, 2004, at 7A; Stogsdill, *supra* note 31, at 3A; Stogsdill, *supra* note 1, at 1A.

³⁷ Stogsdill, *supra* note 31, at 3A.

³⁸ Stogsdill, *supra* note 1, at 1A.

³⁹ *Id.*

kee Chief also expressed his belief that Cherokee tradition never recognized gay marriage.⁴⁰

A Native American Lesbian, Gay, Bi-sexual, and Transgender (“LGBT”) organization, however, lauded the dismissal of Hembree’s case specifically *because* the dismissal honored tribal tradition: “[t]his decision speaks to the primacy of native sovereignty and traditions that demonstrate acceptance and dignity of all human beings and our spiritual traditions.”⁴¹ Those spiritual traditions include the “two-spirited” tradition, which recognized that “[a] person who was homosexual was considered to have both male and female spirits.”⁴² David Cornsilk, a Cherokee journalist, described same-sex relations as “simply a natural part of ‘everyday’ life” in the traditional cultures of the Cherokee, and other tribes.⁴³

Brian Gilley, an anthropology professor of Cherokee descent, submitted an amicus curiae brief to the JAT explaining “there is overwhelming evidence for the historic and cultural presence of multiple gender roles and same-sex relations among most if not all Native North Americans, including the Cherokee, and that they historically shared in the institution of marriage.”⁴⁴ Contrary to the beliefs of Todd Hembree and the mainstream tribal leaders, the anthropological tradition to which Gilley refers is well documented in many tribes.

II. TRADITIONAL NATIVE AMERICAN COMMUNITIES

In 1940, anthropologist Alfred Kroeber noted that “[i]n most of primitive northern Asia and North America, men of homosexual trends adopted women’s dress, work, and status, and were accepted as non-physiological but institutionalized women.”⁴⁵ The anatomically-female, male-identified individuals

⁴⁰ Zizzo, *supra* note 36, at 7A.

⁴¹ Richard LaFortune, *quoted in NCLR Press Release 2006, supra* note 20.

⁴² Zizzo, *supra* note 36, at 7A.

⁴³ *Id.*

⁴⁴ NCLR Press Release 2006, *supra* note 20.

⁴⁵ A.L. KROEBER, *Psychosis or Social Sanction*, in *THE NATURE OF CULTURE* 310, 313 (1952) (originally published by the author in 1940, reprinted in

are called "*Hwame*," and anatomically-male, female-identified individuals are "*Alyha*."⁴⁶

This part looks at the gender system in native North America. Part II.A addresses some preliminary concerns with differences between and among tribes and bias in the primary sources. Part II.B highlights some of the foundational differences between the European and North American conceptions of gender—apart from the *Alyha* and *Hwame* traditions. Part II.C discusses how the foundational differences affect other aspects of the culture. Part II.D looks specifically at the Native American *Alyha* and *Hwame* traditions, and how they fit within the culture. Part II.E examines how this gender system is different from what Westerners term "homosexual" or "transsexual." Part II.F explores how the tradition died off in the recent past, and how radically tribe members' values have changed in order to yield the reaction to McKinley and Reynolds' marriage.

A. *Reification and Ethnocentrism*

There are few truly universal traits shared by all cultures around the world; gender is one of them.⁴⁷ Observable anatomical sex at birth is used to direct children into a particular gender

1952 as a collection with updated commentary). There are many different names for the people Kroeber described. One common term in the literature is "Berdache," which is etymologically derived from the French word for "male prostitute." This author chooses not to use this term because it is a slur that inaccurately reflects the behaviors of these individuals in many of the traditional tribal cultures discussed *supra*. Instead this comment will arbitrarily use the Mohave terms, simply because the Mohave have two separate terms—to refer to these gender-crossing individuals. See, e.g., JONATHAN KATZ, *GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A.*, 423, 440, 451 (Avon Discus Publishing 1976) (a collection of accounts of homosexual behavior and acceptance among various tribes indicative of tribes' broadly variant treatment of individuals engaged in these behaviors).

⁴⁶ George Devereux, *Institutionalized Homosexuality of the Mohave Indians*, 9 HUMAN BIOLOGY 498, 500 (1937).

⁴⁷ See HARRIET WHITEHEAD, *The Bow and the Burden Strap: A New Look at Institutionalized Homosexuality in Native North America*, in LESBIAN & GAY STUDIES READER 501 (Henry Abelove et. al. eds., 1993).

role or set of expectations.⁴⁸ This means that both naturally-created, biological differences and socially constructed expectations are at work in the gender system.⁴⁹ The features of the social construct—gender—are not universal but the existence of a construct is universal.

Gender is in important respects a product of reification; we forget that we, rather than biological predestination, are the authors of gendered expectations.⁵⁰ Attempting to describe the social constructs surrounding gender and sexuality is fraught with pitfalls of inadvertent ethnocentrism.⁵¹ Avoiding an ethnocentric bias in describing native North American social norms is made more complicated due to two problems.

The first of these problems is that while gender is culturally specific, there is not, strictly speaking, one “culture” of native North America.⁵² For the purpose of this comment, it is sufficient that many tribes had some socially sanctioned, or at least socially tolerated, form of the *Alyha* or *Hwame* gender. Tribal views ranged from mild animosity to active encouragement of *Alyha* or *Hwame* identities.⁵³ Native North American tribes seemed to be more accepting of deviation from the gender binary than Europeans were. This comment will focus on similarities and differences between the *average* western and Native-American cultural expectations.

⁴⁸ *Id.* at 501 (“A social gender dichotomy is present in all known societies in the sense that everywhere anatomic sexual differences observable at birth are used to start tracking the newborn into one or the other of two social role complexes. This minimal pegging of social roles and relationships to observable anatomic sex differences is what creates what we call a ‘gender’ dichotomy in the first place, but in no culture does it exhaust the ideas surrounding the two classes thus minimally constituted.”).

⁴⁹ *See id.* at 504.

⁵⁰ *See id.* at 499–500.

⁵¹ *See id.*

⁵² *See* Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 75 Fed. Reg. 60,810 (Oct. 1, 2010) (notice) (listing the 564 “tribal entities” within the contiguous forty-eight North American states recognized and eligible to receive services from the U.S. Bureau of Indian Affairs). *See also* KATZ, *supra* note 45.

⁵³ WHITEHEAD, *supra* note 47, at 502–03.

The second problem is that most of the primary source material on Native American culture is biased by western ethnocentrism. In modern anthropologic circles, ethnocentric bias is avoided, a practice known as cultural relativism.⁵⁴ This practice emerged in the nineteenth century, but most accounts of Native American tribal practices predate cultural relativism.⁵⁵

Before cultural relativism took root, scientists and social thinkers in western culture tended to view the gradual adoption of our views, such as the social stigmatization of supernatural phenomenon, as cultural ascension.⁵⁶ For example, Native American tribes that ascribed positive supernatural value to auditory hallucinations realized that these experiences were unusual or different from normal reality; they merely saw this as a positive divergence from reality.⁵⁷ "The values have changed rather than the perception. And values are cultural facts."⁵⁸ The tribes that noted-anthropologist Alfred Kroeber observed were not deficient or naïve; they merely attached different values to the perception of mental phenomena.⁵⁹ They also saw homosexual behavior and gender-transgression as socially acceptable, sometimes even as valuable.⁶⁰

Even after the emergence of cultural relativism, the extreme social condemnation of homosexuality by western anthropologists bled into their cultural accounts. Kroeber still associated the social acceptance of institutionalized passive homosexuality with backwardness.⁶¹ Part of the difficulty arising from accounting for various tribes' acceptance or condemnation of these gen-

⁵⁴ See KROEBER *supra* note 45, at 317–18 (eschewing the ethnocentric views of the eighteenth and nineteenth centuries and noting the "growing recognition of cultural relativism" among anthropologists).

⁵⁵ *Id.*

⁵⁶ See *id.* at 313 (discussing acceptance of seeing ghosts, hearing voices, receiving prophecies—symptoms of psychosis).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See *id.*

⁶⁰ See *id.*

⁶¹ See *id.* at 317.

der-nonconformists, flows from this cultural taint.⁶² Kroeber explained the difficulty:

While the institution [of cross-dressing or recognized homosexuality] was in full bloom, the Caucasian attitude was one of repugnance and condemnation. This attitude quickly became communicated to the Indians and made subsequent personality inquiry difficult, the later berdaches leading repressed or disguised lives.⁶³

This acknowledgement came from an anthropologist that attempted to adopt cultural relativism, but still shunned some forms of homosexuality.

One of the fullest accounts, with a concerted effort to be unbiased, came from George Devereux, who embedded himself with the Mohave in Arizona and California. Devereux reported the Mohave's folklore, music, and social traditions via quotes from tribe members. Devereux's account is notable in its completeness⁶⁴ and will be relied on heavily as illustration.

B. European and Native American Gender Systems Focus on Different Traits

While every culture imports some social expectations onto anatomical difference, the resultant constructions might be radically different. Both western and Native American societies actually use the same four traits to define an adult's gender: namely, sexual object choice, sexual role, clothing, and productive activity.⁶⁵

Sexual object choice and sexual role are the most important features of gender identity in western culture; deviating from the heterosexual norm in either respect changes one's identity

⁶² See *id.* at 313.

⁶³ *Id.* at 313.

⁶⁴ See WHITEHEAD, *supra* note 47, at 511.

⁶⁵ *Id.* at 513.

or status irrevocably.⁶⁶ Meaning that if you engage in homosexual sex in western society you are called a homosexual, or at least bi-sexual; your status is changed by your sexual object choice. Unlike in western society, homosexual acts would not redefine a person in most Native American societies.⁶⁷ Instead, productive activity or work and clothing are the most important traits for defining and categorizing a person's gender in Native American societies.⁶⁸ One of the most defining features of gender in Native American cultures was productive occupation; many tribes considered boys to be *Alyha* because they preferred women's work over men's work.⁶⁹ Work and clothing were far more important to Native American identity than they were to western identity.

C. *The Different Focus of the Native American Gender Scheme*

Perhaps because the Native American gender system was based on different personal traits, tribal communities' viewed deviation from the norm differently than westerners. Their cultures also valued women and men, vis-à-vis each other, differently.⁷⁰ Kroeber noted their different view on deviation: "[l]ike ourselves, they regard both [psychological phenomena and gender nonconformity] as not normal, in the sense of not being common, everyday in character, or in line with the majority of experienced events. But their social affects towards these are positive or neutral; ours are negative."⁷¹ "To us a person that hears the dead speak, or proclaims that he sometimes turns into a bear, is socially abnormal, at best useless, and likely to be a

⁶⁶ *Id.* at 513, 524. See also ESTHER NEWTON, *Role Models*, in *SYMBOLIC ANTHROPOLOGY: READER IN THE STUDY OF SYMBOLS & MEANING* 337, 341 (J. Dolgin, et. al. eds., 1977).

⁶⁷ WHITEHEAD, *supra* note 47, at 512-13.

⁶⁸ *Id.* at 513.

⁶⁹ *Id.* at 504 (specifically noting "Yurok of northern California," "The Crow of the Plains," "The prairie-dwelling Miami," and tribes of the Southwest more generally).

⁷⁰ See *id.* at 500, 502-03. See also KATZ, *supra* note 45.

⁷¹ KROEBER, *supra* note 54, at 314.

burden or menace.”⁷² Experiences that western culture would consider evidence of psychosis were seen as positive attributes by Lassik and Wailaki people.⁷³ Part of some Native American’s positive attitude towards auditory hallucinations is probably related to their belief that dreams and hallucinations can show one his destiny or give him special powers or lead him to a socially prized occupation.⁷⁴

In the cultures of Native American tribes, gender was not only defined differently, but the relative positions of women and men were also different with respect to each other. Since women’s work could be economically productive, women could bring economic prestige to their family unit.⁷⁵ Social hierarchy within most Native American tribes depended on economic productivity or prestige.⁷⁶ This led to men and women being more socially equal than in contemporaneous western culture, which was still typified by coverture.⁷⁷ Gender equality might explain the relative acceptability of straying from traditional gender limits.⁷⁸

D. Gender Nonconformity is a Major Difference

Perhaps because of the different methods of defining gender and assigning social prestige, Native American tribes permitted gender expression that did not align with anatomical sex. Native American tribes accepted, or at least tolerated, non-binary gen-

⁷² *Id.* at 312.

⁷³ *Id.* at 310 (“[I]n some cultures one of the most respected and rewarded statuses known to the society is acquired only by experience of a condition which in our culture we could not label anything else than psychotic.”).

⁷⁴ *Id.* at 315.

⁷⁵ WHITEHEAD, *supra* note 47, at 518–19.

⁷⁶ *Id.*

⁷⁷ *Id.* at 520; *see, e.g.*, Married Women’s Act, 1861 Ill. Laws 143. Coverture was the legal status of women (particularly married women) under European law and it lasted through the 1800’s in most jurisdictions, essentially unchanged. *See* BLACK’S LAW DICTIONARY 422 (9th ed. 2009). The Illinois statute is a good example of the denial of legal personhood to women in the United States.

⁷⁸ WHITEHEAD, *supra* note 47, at 520.

der expression, and homosexual behavior within their communities.⁷⁹ Among the Mohave these gender nonconformists were called *Alyha* and *Hwame*, but both gender types existed in many North American tribal communities throughout the country.⁸⁰ Tribal languages described them,⁸¹ and social customs prescribed their behavior within the intermediate gender category. The system did not erase anatomical difference from cultural perception, however. References to these people in tribal folklore, creation myths, and traditional ceremonies demonstrate how embedded in tribal custom this gender status was. Tribal society's treatment of sexual expression contemplated their existence too. This sub-part looks at each of these features of the Native American gender scheme in turn.

1. *Alyha* and *Hwame* Statuses are Simultaneously
Both and Neither Gender

Because gender in Native American tribal cultures was first defined by occupation and clothing or by mannerisms, and only secondarily influenced by sexual role and sexual object choice,⁸² it comes as no surprise that *Alyha* did women's work in women's clothes. Among the Mohave, boys destined to become *Alyha* would reportedly, prior to puberty, eschew the toys typical for little boys and instead display an affinity towards girls' and women's games and desire girls' dresses.⁸³ Similarly, girls destined to become *Hwame* were fonder of boys' toys, games, and clothes than girls' and women's pursuits and garb.⁸⁴ Both *Alyha* and *Hwame* used gender-specific words or phrases as well; speaking the way the opposite sex spoke.⁸⁵ Through these ten-

⁷⁹ *Id.* at 500, 502.

⁸⁰ *Id.* at 503. The tradition of gender-crossing was recorded "throughout the Plateau, Plains, Southwest, Prairie, and Southeastern regions of the continental United States and deep into Mesoamerica. Data are missing for the Atlantic and Northeastern states regions. *See id.*

⁸¹ *See* KATZ, *supra* note 45.

⁸² *See* WHITEHEAD *supra* note 47, at 504-24.

⁸³ *Id.* at 502.

⁸⁴ *Id.* at 503.

⁸⁵ *Id.* at 504.

dencies or behaviors, the *Alyha* effectively became women in the eyes of their tribe.⁸⁶

Alyha were more than “women” in tribal societies, however, and *Hwame* were more than “men.” “Throughout most of the continent, the ‘part-man, part-woman,’ was not thought to be, nor forced into the pretense of being, woman in the physiological ‘parts.’”⁸⁷ Unlike in western culture, both anatomical features and behavioral traits—like occupation—equally defined an individual’s gender; thus, “when a nonconcordance arose, . . . neither criterion was used as a final determinant of gender status. Instead, the individual became half the one thing, half the other.”⁸⁸ *Alyha* were frequently described as neither man nor woman—or as *both* man and woman simultaneously.⁸⁹

Despite this recognition, *Alyha* and *Hwame* individuals still experience social marginalization. For example some traditions of familial lineage were not extended to *Alyha* or *Hwame* marriages, because the traditions were described as being somehow too serious.⁹⁰ This demonstrates social marginalization in spite of their social incorporation: they did get married, but it was a bit different. The *Hwame* and *Alyha* were not simply “men” and “women,” they were also both and neither.

2. The Inequality of Women and the *Alyha* and *Hwame* Traditions

Even among the gender-crossers, women and men were not treated identically. In North American cultures, anatomical men enjoyed a privileged status over anatomical women.⁹¹ Bravery was one of the most valued qualities in Mohave men,

⁸⁶ See Devereux, *supra* note 46, at 502.

⁸⁷ WHITEHEAD, *supra* note 47, at 507. See also Devereux, *supra* note 46, at 510 (“You can tease an *hwame*, because she is just a woman, but if you tease an *alyha*, who has the strength of a man, he will run after you and beat you up.”).

⁸⁸ WHITEHEAD, *supra* note 47, at 506–07.

⁸⁹ *Id.* at 505.

⁹⁰ Devereux, *supra* note 46, at 507.

⁹¹ See KATZ, *supra* note 45, at 427.

and *Alyha* formed the root of the term ‘coward’ in the language.⁹² In this way, *Alyha* were sometimes teased for essentially stepping down from prized manliness.⁹³

Hwame were not accepted in as many tribes as *Alyha* were.⁹⁴ Tribes were more likely to recognize a *Hwame*-like status merely in their folklore rather than in their community.⁹⁵ Tribes passed along stories of female-bodied people successfully performing the masculine gender role, gaining some measure of masculine status in the process.⁹⁶ Even in tribes that did recognize the status, *Hwame* were less likely than *Alyha* to be identified as “men,” even if they were referred to with male pronouns, married women as a husband, or became warriors.⁹⁷ The social difference in the acceptability of *Hwame* and *Alyha* might be explained by the pervasive spiritually-based taboo of menstruation.⁹⁸ Devereux also posited that *Hwame*’s susceptibility to rape was another reason for their relative rarity as compared with their male-bodied counterparts.⁹⁹ Because the *Hwame* status could not overcome these anatomical differences, girls were particularly discouraged from becoming *Hwame*.¹⁰⁰

3. *Alyha* and *Hwame* are in the Traditions, Religion, and Folklore of the Tribes

The tradition of gender-crossing is deeply rooted in tribal culture and religion.¹⁰¹ The Kamia, close relatives of the Mohave,

⁹² Devereux, *supra* note 46, at 517.

⁹³ WHITEHEAD, *supra* note 47, at 506.

⁹⁴ *Id.* at 507.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See KATZ, *supra* note 45, at 433–34, 451; see also KATZ, *supra* note 45, at 459–69 (excerpting EDWIN T. DENIG; BIOGRAPHY OF A WOMAN CHIEF (1855–56)).

⁹⁸ See WHITEHEAD, *supra* note 47, at 508–09 (discussing menstruation taboos in the gender-crossing tradition at length).

⁹⁹ See Devereux, *supra* note 46, at 519.

¹⁰⁰ *Id.* at 503.

¹⁰¹ See *id.* at 501.

have a folk tale with a gender-crosser as the hero.¹⁰² The Mohave trace their cultural recognition of gender nonconformity to their creation myths.¹⁰³ Their religion expressly sanctioned both the *Alyha* and the *Hwame*.¹⁰⁴ They believed that at the beginning of the world the God Matavilye told them that “some among them would turn into transvestites.”¹⁰⁵ The Mohave religion taught that the tendency towards the status of *Alyha* or *Hwame* originated in utero and became noticeable before puberty.¹⁰⁶

Religion also played a role in recognizing this tendency in a child.¹⁰⁷ If a child showed a predisposition towards being *Alyha* or *Hwame*, family members “soon realize[d] that nothing can be done about it,”¹⁰⁸ so they prepared an initiation ceremony to officially confirm the status.¹⁰⁹ The ceremony originated with the god Mastambo.¹¹⁰ The highly ritualized ceremony was not a transformation but an affirmation of a pre-existing, immutable identity.¹¹¹

The cultural incorporation of *Alyha* went further than religion, folklore, and the initiation ceremony. In some tribes, the *Alyha* held special occupations, including a special wartime role.¹¹² *Alyha* and *Hwame* were said to have positive attributes like good luck or powerful shamanism.¹¹³ In fact, “shamans specializing in the cure of hikupk (syphilis), were lucky in love and had no difficulty in obtaining homosexual spouses.”¹¹⁴ This is

¹⁰² *Id.* at 501.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 503.

¹⁰⁶ *Id.* at 501; *see also id.* at 507 (explaining that boys were initiated as *Alyha* as early as age ten or eleven).

¹⁰⁷ *See id.* at 506.

¹⁰⁸ *Id.* at 503 (quoting a tribe-member’s description of the family’s reaction to the cultural practice).

¹⁰⁹ *Id.* at 505.

¹¹⁰ *Id.* at 506.

¹¹¹ *Id.* at 509.

¹¹² WHITEHEAD, *supra* note 47, at 506.

¹¹³ Devereux, *supra* note 46, at 516.

¹¹⁴ *Id.* (discussing shamans that were not *Alyha* or *Hwame*).

similar to how women in our culture are said to be more compassionate or how gay men are known to be good dancers; it is all part of the gender scheme.

4. Defining the *Alyha* and *Hwame* Role

The Mohave adhered to strict sexual role-playing, which extended to the *Alyha* and *Hwame* performing the role of their adopted gender.¹¹⁵ Youths engaged in sexually explicit play: showing each other their genitals, nicknaming playmates for features of each other's genitalia, mutual masturbation, and older boys forcibly engaging in anal sex with younger children.¹¹⁶ However, pedophilia was proscribed among adult men.¹¹⁷ Mohave spoke frequently of sex and genitalia.¹¹⁸ Gender-crossing individuals insisted their sexual organs be referred to as those of their performative gender.¹¹⁹ At least among Mohave, anal and oral penetrative sex was so accepted in heterosexual couples that for a man to marry an *Alyha* woman would not greatly change his sexual expression within the marriage—sexual role was more important.¹²⁰

¹¹⁵ See *id.* at 510–11. The informants' reports speak freely of masturbation, oral and anal sex with men, anal sex with women, and manual stimulation of women or men. *Id.* at 511. But when asking one man if he would play with his *Alyha*-wife's erection, the man responded "She would kill me." *Id.* Oral sex with women was taboo because vaginal secretions were seen as smelly; any sort of sex with old women led to mocking her suitor because of the perceived bad 'old woman' smell. *Id.* at 519. Anal intercourse with women was seen as "the proper way to prepare immature girls for marriage"; that, along with the acceptance of fellatio led Devereux to speculate that being with an *Alyha* wife was probably not much different than being with an anatomically female one. *Id.* at 514.

¹¹⁶ *Id.* at 499.

¹¹⁷ *Id.* at 500.

¹¹⁸ *Id.* at 510.

¹¹⁹ *Id.*

¹²⁰ See *id.* at 514.

E. Similarities and Differences between Alyha and Hwame Traditions and Western Homosexual Identities

It is not entirely accurate to describe the social statuses within Native American communities by any of the terms that we might use to describe non-binary gender expression in western culture. Homosexual, transgendered, and transsexual all carry social connotations specific to our gender system.¹²¹ This is in part because the western gender system is defined primarily by sexual object choice; whereas, the Native American gender scheme relies more on occupation.¹²² That being said, there is an aspect of gender crossing in at least some Native American cultures that is linked to what western culture now calls homosexuality.¹²³

The Native American's view of homosexuality is easily distinguishable from the perspective of Westerners:

It is only since eighteenth-century enlightenment that homosexuality has begun to be regarded in Occidental civilization as somewhat less than the ultimate abomination and offense. Our tolerance toward it has increased in proportion with what we call our enlightenment. And certainly the American Indian system seems to work well from the angle of human happiness: the invert is free to work out his inner satisfactions as he can, without persecution from without; and society does not feel itself injured or endangered. A status of adjustment is achieved instead of one of conflict and tension.¹²⁴

¹²¹ See WHITEHEAD, *supra* note 47, at 501.

¹²² See *id.* at 501, 505.

¹²³ See KROEBER, *supra* note 45, at 314 ("In berdachism accordingly we have another sex of psychiatric phenomena, those of sexual inversion, which our culture still regards as abnormal, a social if not antisocial, and in general views with considerable affect of repugnance, but which certain primitives accept with equanimity and provide a definite social channel for.").

¹²⁴ *Id.* at 314.

This quote demonstrates Kroeber's observation that acceptance of homosexuality might be correlated with enlightenment, even while he uses the derogatory terms of the 1940's, calling homosexuals "inverts."¹²⁵

1. Sexual Object Choice is Not Determinative of Identity

An earlier traveler to the American Southwest also reported institutionally accepted homosexual behavior among the Mohave.¹²⁶ The link between the institution of gender-crossers and the acceptability of homosexual behaviors is admittedly obfuscated, because "the North American Indian attitude toward the berdache stresses not his erotic life but his social status; born a male, he became accepted as a woman socially."¹²⁷

Being the sexual partner of an *Alyha* or *Hwame* would not change the Mohave to the official gender-crossing status.¹²⁸ The idea that sexual behavior might force a Mohave man into the *Alyha* status was "unanimously discredited" by the Mohaves with which Devereux spoke.¹²⁹ "Once a young person started off 'right' there is no danger of his or her becoming homosexual (*alyha* or *hwame*) even if occasional unions with homosexuals should occur."¹³⁰ Merely engaging in homosexual sex occasionally or during childhood did not transform a man into an official homosexual, or an *Alyha*, in the Mohave community.¹³¹ The idea that homosexual sex is not determinative of *Alyha* status strongly differentiates it from modern, western "homosexual" status.

Some people in contemporary western culture might suggest that the *Alyha* were transsexual or transgendered because they "were allowed among many American Indian tribes to assume

¹²⁵ See *id.*

¹²⁶ Devereux, *supra* note 46, at 498.

¹²⁷ KROEBER, *supra* note 45, at 313.

¹²⁸ Devereux, *supra* note 46, at 500-01.

¹²⁹ *Id.* at 507-08.

¹³⁰ *Id.* at 501 (quoting a tribe member's explanation of the social practice).

¹³¹ *Id.* at 500.

officially the status of a woman.”¹³² Unlike trans-women in modern culture, however, the Mohave *Alyha* were still publicly acknowledged to be anatomically male.¹³³ In some tribes, the *Alyha* were reported as openly engaging in sex with both genders without compromising their sexual partners’ gender identity.¹³⁴ This further separates their status from their anatomical sex and reinforces their status as both male and female. They do not conform to western culture’s definition of homosexual or transsexual.

Homosexual acts do not redefine a person in most Native American societies, unlike in western society.¹³⁵ Rather, the redefinition happened through a ritualized dream or vision, or through general preference during youth.¹³⁶

In contradistinction to occupational and clothing choice, cross-sex erotic choice is never mentioned as one of the indicators of the budding berdache. It was not as if homosexual behavior was unrecognized in North America. Homosexual acts between persons of ordinary gender status were known to occur or were recognized as a possibility among a number of tribes on which data are available. In some cases such behavior seems to have met with no objection; more often, it was negatively sanctioned as some sort of evil, inadequacy, or foolishness.¹³⁷

Even this social condemnation did not rise to the level of transforming someone’s perceived identity.

¹³² *Id.* at 520.

¹³³ *See supra* notes 97–100 and accompanying text. It is hard to say if this is a product of the *Alyha*’s inability to physically transform her genitalia, or if it may evidence some psychological status or self-conception different from the transpeople in our country today.

¹³⁴ WHITEHEAD, *supra* note 47, at 512.

¹³⁵ *See id.* at 512. *See also supra* notes 65–69 and accompanying text.

¹³⁶ *Id.* at 503. *See also supra* notes 101–111 and accompanying text.

¹³⁷ *Id.* at 511 (internal citations omitted) (referencing multiple accounts from various tribes at different times).

2. Dating and Marrying *Alyha* or *Hwame* as Part of the Cultural Tradition

Alyha and *Hwame* sexual relationships, including marriages, generally conformed with their adopted gender rather than their anatomical sex.¹³⁸ But some Mohave, who were not identified as *Alyha* or *Hwame*, only took same-sex spouses.¹³⁹ Most often the *Alyha* or *Hwame* marriages were second marriages, either polygamist or after an earlier divorce.¹⁴⁰ In some tribes, men would boast about flirting with *Alyha* and having sex with them.¹⁴¹

At dances even boys who had no intention of marrying an *Alyha* played around with them, as though they were flirtatious women.¹⁴² “In the end some of them made up their minds to become the husbands of an *alyha*.”¹⁴³ Once they were married the *Alyha* made exceptionally industrious wives.¹⁴⁴

Alyha could be courted and *Hwame* could court but neither could participate in the most acceptable form of courting, which involved a boy sleeping beside a girl in her parent’s home for several nights before taking her as a wife.¹⁴⁵ Rather, *Alyha* were courted “like widows, divorcees or lewd women,” and *Hwame* courted the same set of women.¹⁴⁶ The *Hwame* occasionally took wives as men would.¹⁴⁷ The *Alyha* and *Hwame* performance of the social roles of the opposite sex extended to marital status.¹⁴⁸

¹³⁸ *Id.* at 510.

¹³⁹ Devereux, *supra* note 46, at 518.

¹⁴⁰ WHITEHEAD, *supra* note 47, at 510.

¹⁴¹ *Id.*

¹⁴² Devereux, *supra* note 46, at 513 (quoting an unnamed Mohave informant).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Devereux, *supra* note 46, at 515.

¹⁴⁸ WHITEHEAD, *supra* note 47, at 503; *see generally* Devereux, *supra* note 46, at 514–15.

Kroeber and Devereux both quoted the story of Kuwal, a Mohave shaman who had married several *Alyha* during his lifetime.¹⁴⁹ Kuwal explained that the Mohave did tease the spouses of *Alyha* and *Hwame* for choosing a spouse of the same anatomical sex; however, there was no point in teasing the *Alyha* or *Hwame* because they could not help but be who they were.¹⁵⁰

F. *Acculturation in Process*

This complex institutionalized gender system, so different from our own, has largely disappeared. Accounts of Native Americans' acceptance of homosexuality or non-binary gender expression are found in the outrage of European missionaries at the tribes' failure to condemn these "deviants."¹⁵¹ Kroeber explained that these observers' views were being communicated to the culture and influencing it.¹⁵²

Alyha and *Hwame* had mostly disappeared in the northwestern United States as early as the late 1800's.¹⁵³

In the old days, a few men (some of them probably hermaphrodites or homosexuals) donned women's clothing and took up women's occupations. Some such persons are still known, but all of them are middle-aged or older. It may be that the bachelors in their thirties who live in various communities today are individuals of these two types who fear the ridicule of white persons and so do not change clothing.¹⁵⁴

¹⁴⁹ Devereux, *supra* note 46, at 521–23; KROEBER, *supra* note 45, at 316.

¹⁵⁰ Devereux, *supra* note 46, at 515, 518.

¹⁵¹ See KATZ, *supra* note 45, at 451–52 (quoting Issac McCoy who visited the Osage around 1828 and expressed disgust with an *Alyha* among them).

¹⁵² See KROEBER, *supra* note 45, at 313–14.

¹⁵³ WHITEHEAD, *supra* note 47, at 502.

¹⁵⁴ KATZ, *supra* note 45, at 490 (quoting DOROTHEA LEIGHTON & CLYDE KLUCKHOHN, CHILDREN OF THE PEOPLE: THE NAVAHO INDIVIDUAL AND HIS DEVELOPMENT 708–12 (Harvard Univ. Press 1948)); see also KATZ, *supra* note 45, at 472–78 (quoting MATILDA COXE STEVENSON, A DEATH WHICH CAUSED UNIVERSAL REGRET (1896–97)).

Other accounts note that after about 1900 the *Alyha* stopped cross-dressing but still retained the social status *Alyha*.¹⁵⁵

Perhaps because of its remoteness, homosexuality was still socially accepted on the Mohave reservation as late as the 1930's, although none of the residents self-identified as homosexual.¹⁵⁶ Several men on the reservation were rumored to be homosexuals, two of whom lived together and were "usually referred to as each other's wives and are said to indulge in rectal intercourse."¹⁵⁷ One of Devereux's interviewees related that it was a shock to discover that an *Alyha*-friend was not an anatomical woman.¹⁵⁸ This may suggest that the tribal population was becoming less accustomed to the tradition. Devereux pointed out that in the 1930's on the Mohave reservation, "[t]o call a person a 'homosexual' when he is not, is a bad insult and is fiercely resented."¹⁵⁹

By 1940, Kroeber spoke of the institution of gender-crossing as a system that had been stamped out and repressed.¹⁶⁰ Now, Native Americans share the European's attitude; an excellent example of this attitude is the tribes' reaction to the marriage of Dawn McKinley and Kathy Reynolds, discussed in part I above. The adoption of western cultural views might be attributable to various changes, such as "increases of the size of the social group, technological or economic factors, the growth of science, [and] a greater sense of security."¹⁶¹ For Native American cul-

¹⁵⁵ WHITEHEAD, *supra* note 47, at 505 ("[I]t was possible in the twentieth century for persons to maintain the gender-crossed status by occupation alone while dressing, in response to white pressure, as befitted anatomic sex."); *see also* Devereux, *supra* note 46, at 509 ("[N]owadays homosexuals do not don the garb of the opposite sex.").

¹⁵⁶ *See* Devereux, *supra* note 46, at 498.

¹⁵⁷ *Id.* at 498-99.

¹⁵⁸ *Id.* at 507 (noting Devereux's suspicion that the informant's surprise was probably feigned).

¹⁵⁹ Devereux, *supra* note 46, at 518. It is unclear if Devereux here means "homosexual" as in "someone who has sex with people of the same gender" or as in "someone who is *Alyha* or *Hwame*." He uses both somewhat interchangeably.

¹⁶⁰ *See* KROEBER, *supra* note 45, at 313-14.

¹⁶¹ *Id.* at 313.

tures, the acculturation process may have been caused by less benign triggers.

III. LEGAL REPRESSION OF NATIVE AMERICAN COMMUNITIES

One possible explanation for the disconnect between present and past value systems was supplied by Jonathan Katz, who compiled an extensive array of historical documentation of these traditions:

One fact that emerges clearly here is that the Christianization of Native Americans and the colonial appropriation of the continent by White, Western ‘civilization’ included the attempt by the conquerors to eliminate various traditional forms of Indian homosexuality—as part of their attempt to destroy that Native culture which might fuel resistance—a form of cultural genocide involving both Native Americans and Gay people. Today, the recovery of the history of Native American homosexuality is a task in which both Gay and Native peoples have a common interest.¹⁶²

Katz suggests that part of this “cultural genocide” was caused intentionally. However, many other, unintentional, factors could have also contributed to this cultural genocide. This section focuses on three contributing factors—of the intentional sort—pointed out by Katz: land appropriation, Christianization efforts, and the destruction of native cultural practices. Part III.A of this comment looks at the Discovery Doctrine and how Christian dogma was employed initially to subjugate Indians. Part III.B examines federal governmental actions specifically designed to promote Christianization and to suppress native Religious or Cultural Practices among Native American Communities. Part III.C looks at how Native Americans’ lost property rights augment their religious oppression even into the late 20th

¹⁶² *Id.* at 429.

Century. While the federal government is not solely to blame for the loss of traditional Native American cultural practices and belief systems, federal actions have contributed to the acculturation of Native American people and the loss of some aspects of their tribal identities.

**A. *The Discovery Doctrine in the U.S. Strips
Tribes of their Property***

Building on centuries of European common law, two early United States Supreme Court cases established Native Americans' lack of sovereignty and the incorporeal nature of their property rights. These cases perpetuated the European "Discovery Doctrine," and set the stage for later acts which further marginalized the Native American population.

1. Origins of the Discovery Doctrine

When Europeans first arrived in the Americas, they claimed the land they "discovered" for their monarchs; their self-appointed right to discovery traces back to Pope Nicholas V, who in 1455, granted Portugal the right "to invade, search out, capture, vanquish, and subdue all Saracens and pagans whatsoever, and other enemies' . . . to put them into perpetual slavery, and to take all their possessions and property."¹⁶³ In 1493, King Henry VII of England issued a royal decree to John Cabot, The Cabot Charter, which was similar to the Pope's decree.¹⁶⁴ This European, Christian tradition led to the creation of all of the colonies in North America.¹⁶⁵ The conquest of the future American colonies by the British consisted of John Cabot sailing

¹⁶³ Steven T. Newcomb, *The Evidence of Christian Nationalism in Federal Indian Law: The Doctrine of Discovery, Johnson v. McIntosh, and Plenary Power*, 20 N.Y.U. REV. L. & SOC. CHANGE 303, 310 (1993) (quoting EUROPEAN TREATIES BEARING ON THE HISTORY OF THE UNITED STATES AND ITS DEPENDENCIES TO 1648 23 (Frances G. Davenport ed. 1917)).

¹⁶⁴ *Id.* at 311; see also, Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 576 (1823). In the same year, Pope Alexander VI gave Spain the lands discovered by Christopher Columbus. Newcomb, *supra* note 163, at 310.

¹⁶⁵ Johnson, 21 U.S. at 579-80.

along the Atlantic coastline without coming ashore.¹⁶⁶ Spain, France, Great Britain, Portugal, and Holland all based their acquisitions in North America on the right granted by the Pope, to appropriate discovered lands that “were not actually possessed by any Christian prince or people.”¹⁶⁷

European nations recognized their respective claims to Native-occupied lands through treaties.¹⁶⁸ Treaties between the Europeans and Native Americans, however, were not honored: the Board of Indian Commissioners¹⁶⁹ included in its first report, the United States’ “shameful record of broken treaties and unfulfilled promises” to the tribes.¹⁷⁰ It seems that the difference between asserting European ownership under the doctrine, and asserting Native occupants’ ownership, was the Natives’ status as non-Christians.¹⁷¹

[T]he character and religion of [this immense continent’s] inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The

¹⁶⁶ *Id.* at 576; see also *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 3–4 (1831) (syllabus) (“The foundation of this charter, the bill states is asserted to be the right of discovery to the territory granted; a ship manned by the subjects of the king having, ‘about two centuries and a half before, sailed along the coast of the western hemisphere, from the fifty-sixth to the thirty-eighth degree of north latitude, and looked upon the face of that coast without even landing on any part of it.’”).

¹⁶⁷ *Johnson*, 21 U.S. at 574–77.

¹⁶⁸ *Id.* at 581 (discussing the European nations’ use of treaties to resolve land disputes among themselves even though the lands in question were occupied by Native American tribes).

¹⁶⁹ See *infra* note 210 and accompanying text.

¹⁷⁰ Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773, 773 (1997) (quoting BD. OF INDIAN COMM’RS., ANNUAL REPORT 7 (1869)). See also *Cherokee Nation v. Georgia*, 30 U.S. at 23–24 (Johnson, J. concurring) (“[I]t was wise to prepare them for what was probably then contemplated, to wit, to incorporate them in time into our respective governments: a policy which their inveterate habits and deep seated enmity has altogether baffled.”).

¹⁷¹ *Johnson*, 21 U.S. at 576 (“The right of discovery given by [the Cabot] commission, is confined to countries ‘then unknown to all Christian people.’”); see Dussias, *supra* note 171, at 822–23.

potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on [the Native Americans] civilization and Christianity, in exchange for unlimited independence.¹⁷²

Essentially, the Native Americans were divested of sovereignty and title in their land, and in exchange they got Christianity.¹⁷³

2. The Discovery Doctrine's Introduction into United States Law

When Native American's property rights to their ancestral lands came before the Supreme Court, in *Johnson v. McIntosh*, in 1823, the Court first recognized the Discovery Doctrine.¹⁷⁴ Europeans were on both sides of the dispute: the plaintiffs had purchased their land from Native American tribal elders,¹⁷⁵ and the defendants had gotten their land from the federal government.¹⁷⁶ Throughout the settlement of North America, Europeans had occasionally purchased land from Native Americans and then had their ownership recognized by the crown or equity courts.¹⁷⁷ Since the plaintiffs' ownership had not been recognized by any European court, the question became: do Native Americans own their tribal lands such that the conveyance of these lands to other individuals would be recognized by the courts of the United States?¹⁷⁸

¹⁷² *Johnson*, 21 U.S. at 573.

¹⁷³ *Id.* at 573-74. "Although we do not mean to engage in the defence of those principles which Europeans have applied to Indian title, they may, we think, find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them." *Id.* at 589.

¹⁷⁴ *Johnson*, 21 U.S. at 543. See generally Newcomb, *supra*, note 163. See also Dussias, *supra* note 170, at 822-23.

¹⁷⁵ *Johnson*, 21 U.S. at 571-72.

¹⁷⁶ See *id.* at 560.

¹⁷⁷ *Id.* at 600-03.

¹⁷⁸ See *id.* at 571.

Chief Justice Marshall's opinion for the court in *Johnson* is known for establishing the legal concept of "Indian Title."¹⁷⁹ Indian Title is an exclusive right to occupancy subject to the government's legal ownership of the land.¹⁸⁰ Justice Marshall wrote, "The ceded territory was occupied by numerous and warlike tribes of Indians; but the exclusive right of the United States to extinguish their title, and to grant the soil, has never, we believe, been doubted"¹⁸¹

Even though European nations and colonial governments had executed treaties with the tribes, this provided no help to Native American claimants.¹⁸² "[D]iscovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest[.]"¹⁸³ Indian title became a temporary right to occupy the land claimed by the United States, until such time as the United States chose to send Europeans there under claim of right.¹⁸⁴

The Court supported the extinguishable nature of Indian Title with a few different assertions. First, the Court framed the acquisition of Native Americans' lands as the spoils of war: "Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted."¹⁸⁵ Then the court simply argued that it was too late to try and recognize Native Americans' ownership; our entire country was founded on taking Native Americans' lands.¹⁸⁶

¹⁷⁹ *Id.* at 565–69.

¹⁸⁰ *See id.*

¹⁸¹ *Id.* at 586.

¹⁸² *See generally Johnson*, 21 U.S. at 597–99 (explaining that past purchases by Europeans of tribal lands were done simply to placate the dangerous natives; similarly, expansion away from already-established European settlements was restrained not for lack of legal right but out of fear of the natives).

¹⁸³ *Id.* at 587.

¹⁸⁴ *See id.*

¹⁸⁵ *Id.* at 588.

¹⁸⁶ *See id.* at 579 ("Thus has our whole country been granted by the crown while in the occupation of the Indians."). *See also Johnson*, 21 U.S. at 591 ("[I]f a country has been acquired and held under it; if the property of the

Five years after *Johnson* established Indian Title, Georgia passed several laws that appropriated lands and gold mines held by the Cherokee Nation within the territorial limits of Georgia.¹⁸⁷ Until that time, Cherokees had managed to keep possession of their lands by promising to behave like a “civilized,” Christian, agrarian society.¹⁸⁸ They made this promise for good reason; many Cherokee people had previously been forcibly removed to United-States-assigned territories in Oklahoma, and were killed by other tribes upon their arrival.

In the Cherokees’ attempt at securing their title, the Cherokee Nation emphasized, to the Court, their adoption of Christian traditions.¹⁸⁹ The Cherokees in Georgia explained that their community had formed a government modeled after the United States.¹⁹⁰ The Cherokees established schools, largely converted to Christianity, and abided by their treaty obligations with the United States.¹⁹¹

Adopting the trappings of western society was insufficient to protect the Cherokees’ title because the Supreme Court would have had to recognize the tribe as a foreign state—a fellow sovereign—in order to hear the case.¹⁹² Justice Johnson, who concurred in the result, warned against recognizing Indians as foreign states:

Where is the rule to stop? Must every petty kraal of Indians, designating themselves a tribe or nation, and having a few hundred acres of land to hunt on exclusively, be recognized as a state? We should indeed force into the family of nations, a

great mass of the community originates in it, it becomes the law of the land and cannot be questioned.”).

¹⁸⁷ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 7 (1831) (syllabus).

¹⁸⁸ *See id.* at 5–6, 9–10.

¹⁸⁹ *See id.* at 6.

¹⁹⁰ *See id.*

¹⁹¹ *See id.*

¹⁹² *See id.* at 15–16 (The Cherokees sued under the Supreme Court’s original jurisdiction.).

very numerous and very heterogeneous progeny.¹⁹³

Marshall, writing for the court, was no more sympathetic to the Cherokees' situation:

If it be true that the Cherokee nation have rights, this is not the tribunal in which those rights are to be asserted. If it be true that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future.¹⁹⁴

The Supreme Court dismissed the Cherokees' claims due to lack of standing, because the Indian tribes were neither foreign states, nor domestic states¹⁹⁵—but “domestic dependent nations.”¹⁹⁶

Through *Johnson*, the Supreme Court established that Native Americans' lands were technically the property of the federal government subject only to Indian Title—an occupancy right that could be extinguished at will. Through *Cherokee Nation*, the Supreme Court established Native Americans' position as “domestic dependent nations.” These two concepts laid the groundwork for future actions by the federal government that contributed to the decline of tribal traditions.

B. Federal Laws Promoted Christianity & Suppressed Native Religion

Starting in 1871, the United States changed its policy on dealing with tribal nations to begin treating them as wards rather than adversaries or non-entities.¹⁹⁷ The federal government began implementing laws and regulations specifically designed to

¹⁹³ *Id.* at 25. See also *id.* at 21 (Johnson, J. concurring in result) (“I cannot but think that there are strong reasons for doubting the applicability of the epithet state, to a people so low in the grade of organized society as our Indian tribes most generally are.”).

¹⁹⁴ *Id.* at 20.

¹⁹⁵ See *id.* at 16.

¹⁹⁶ *Id.* at 17.

¹⁹⁷ See 17 AM. JUR. 2D *Treaties with Indians* § 54 (2010).

convert the Native Americans to Christianity and eventually integrate them into European-American communities. "With justice, personal rights, and the protection of law, the Gospel will do for our Red brothers what it has done for the other races—give to them homes, manhood and freedom."¹⁹⁸ Government officials viewed conversion to Christianity as indispensable to "civilizing" the Native Americans.¹⁹⁹ This project was initially called the "Peace Plan,"²⁰⁰ and these efforts continued for roughly eighty years.

Over the lifespan of the Peace Plan the federal government (1) placed Native American reservations under the supervision and control of Christian overseers,²⁰¹ (2) required Christian parochial schooling,²⁰² and (3) outlawed various Native American cultural and religious ceremonies.²⁰³ Throughout the duration of these policies the government compiled annual reports statistically tracking assimilative characteristics of Native-American communities.²⁰⁴ Each of these policies was designed to further assimilation; they worked.

1. Peace Plan Wardship by Christians

Congress appointed a committee to investigate the relationship between government agents and Native Americans.²⁰⁵ In 1867 that committee's report noted widespread abuses in the implementation of federal policies and recommended that an oversight system, in part manned by religious groups, be

¹⁹⁸ Dussais, *supra* note 170, at 776 (quoting H.B. Whipple, *Preface to HELEN JACKSON, A CENTURY OF DISHONOR: A SKETCH OF THE UNITED STATES GOVERNMENT'S DEALINGS WITH SOME OF THE INDIAN TRIBES*, at xxiv (University of Okla. Press 1995)).

¹⁹⁹ Dussias, *supra* note 170, at 781.

²⁰⁰ *Id.* at 777–78.

²⁰¹ *See infra* notes 205–23 and accompanying text.

²⁰² *See infra* notes 224–30 and accompanying text.

²⁰³ *See infra* notes 230–48 and accompanying text.

²⁰⁴ Dussias, *supra* note 170, at 780 (quoting BD. OF INDIAN COMM'RS AFFAIRS, ANNUAL REPORT 60–74 (1873)).

²⁰⁵ *Id.* at 777–78.

implemented.²⁰⁶ At first the federal government mostly used Quakers, but after 1870 it used many different Christian sects to convert the Native Americans and educate them in western traditions.²⁰⁷ The federal government and the Christian missionaries both wanted to assimilate Native Americans into western society by discouraging their cultural and religious practices.²⁰⁸ In 1868, the Peace Commission, another Congressional committee, reported that the United States' policy towards the Native Americans had been "uniformly unjust."²⁰⁹

The legal status of the uncivilized Indians should be that of wards of the government; the duty of the latter being to protect them, to educate them in industry, the arts of civilization, and the principles of Christianity The establishment of Christian missions should be encouraged, and their schools fostered. . . . the religion of our blessed Saviour is believed to be the most effective agent for the civilization of any people.²¹⁰

In President Grant's 1869 inaugural address, he declared his intent to pursue "any course . . . which tends to [Indian] civilization and ultimate citizenship."²¹¹ Grant's administration hoped to use government funds and Christian organizations to establish churches and parochial schools on Native American reservations to further the ultimate goal of assimilating the tribal communities.²¹² To effect this mission, Grant established the "[B]oard of Indian Commissioners and the allotment of Indian agencies to religious groups."²¹³ Between 1869 and 1882, the federal government directly funded (mostly Protestant) Chris-

²⁰⁶ *Id.* at 778.

²⁰⁷ *Id.* at 781.

²⁰⁸ *Id.* at 775.

²⁰⁹ See Dussias, *supra* note 170, at 778 n.23 (quoting H. EXEC. DOC. NO. 40-97, at 15-17 (1898)).

²¹⁰ *Id.* at 773 (quoting BD. OF INDIAN COMM'RS, ANNUAL REPORT 10 (1869)).

²¹¹ *Id.* at 778.

²¹² See *id.* at 779.

²¹³ *Id.* at 779.

tian missionaries working on Native American reservations as government agents.²¹⁴ After a preliminary inquiry, the Board happily reported that “the Indian, as a race, can be induced to work, is susceptible of civilization, and presents a most inviting field for the introduction of Christianity.”²¹⁵

Public support for the Peace Policy declined in the wake of violent clashes sparked by forced tribal relocations implemented between 1876 and 1882.²¹⁶ Oklahoma, the target of many of these relocations, has the largest Native American population; Arizona follows in distant second place.²¹⁷ In 1877, President Hayes succeeded Grant in office and refocused away from Christianization and towards promoting property ownership; federal focus shifted back and forth during the next several administrations.²¹⁸ In 1887, Congress enacted the Indian Land Allotment Act which, in addition to allocating real property rights to tribe-members and granting citizenship rights, allocated land to “any religious society or other organization . . . for religious or educational work among the Indians.”²¹⁹

The Commissioner of the Bureau of Indian Affairs’²²⁰ statistics indicate that the number of churches on reservations had more than tripled between 1890 and 1920.²²¹ The number of Catholics and Protestants also increased substantially just over the ten years between 1910 and 1920.²²² These religious statistics were recorded with as much detail as statistics about crimi-

²¹⁴ *Id.* at 774, 777.

²¹⁵ Dussias, *supra* note 170, at 780 (quoting BD. OF INDIAN COMM’RS. ANNUAL REPORT 9 (1869)).

²¹⁶ *Id.* at 780.

²¹⁷ *Id.*

²¹⁸ *Id.* at 782–83.

²¹⁹ The Dawes Act, ch. 119, 24 Stat. 388, 390 (1887). The act also conditioned the citizenship grant on, among other things, having “adopted the habits of civilized life.” *Id.*

²²⁰ The Board of Indian Commissioners continued to exist through 1934 but it ceased to have any official responsibilities in 1882. Dussias, *supra* note 170, at 783.

²²¹ *Id.*

²²² *Id.*

nal activities, literacy, and marriages—interracial and intraracial.²²³

2. Mandatory Christian Education

During the Peace Policy, the government awarded contracts to religious organizations to run schools for tribes.²²⁴ Educational policies were seen as indispensable to the goal of assimilating the Native Americans: “[E]ducation ‘cuts the cord that binds [Indians] to a Pagan life, places the Bible in their hands, and substitutes the true God for the false one, Christianity in place of idolatry. . . cleanliness in place of filth, industry in place of idleness.’”²²⁵ Conflicts between this policy and the Establishment clause were not even considered until 1892, when Protestants started attacking the use of Catholic, rather than Protestant, sects in government-funded tribal schools.²²⁶

Even after the Peace Policy ended, parochial schools continued to play an important role in the federal government’s presence on Indian lands.²²⁷ When, after 1897, the government stopped funding sectarian schools, it replaced them with government-run schools.²²⁸ The government-run schools required the observance and practice of nondenominational Christianity by students, and while Catholics complained that “nondenominational” meant Protestant, no one seemed to complain that the Native Americans were not allowed to keep their *own* religion.²²⁹ Federal regulations from as late as the 1920’s required church and Sunday school attendance by all Indian students at government boarding schools.²³⁰

²²³ *Id.*

²²⁴ Dussias, *supra* note 170, at 784.

²²⁵ *Id.* at 783 (quoting SUPERINTENDENT OF INDIAN EDUC. ANNUAL REPORT 131 (1887)).

²²⁶ *Id.* at 784.

²²⁷ *Id.* at 783.

²²⁸ *Id.* at 785.

²²⁹ *Id.* at 786–87.

²³⁰ *Id.* at 802–03.

3. Native American Cultural Ceremonies Outlawed

Around the same time that it was forcibly relocating many Native Americans between 1876 and 1882, shortly before the Allotment Act, the government was concentrating its assimilation efforts on suppressing ceremonial dances.²³¹ Secretary of the Interior Henry Teller proclaimed, "if it is the purpose of the Government to civilize the Indians, they must be compelled to desist from the savage and barbarous practices that are calculated to continue them in savagery, no matter what exterior influences are brought to bear on them."²³² When the Commissioner of Indian Affairs defined "Indian Offenses" in 1883, the outlawed acts included participating in native cultural dances, practicing as a medicine man, and distributing or destroying property; each act played a role in Native American religious practices.²³³

The prohibition was not enforced equally against all dances; the most feared dances were seen as particularly sacrilegious because of their sexual overtones.²³⁴ A Protestant organization described these dances:

[T]he great evils in the way of their ultimate civilization lie in these dances. The dark superstitions and unhallowed rites of a heathenism as gross as that of India or Central Africa still infects them with its insidious poison, which, unless replaced by Christian civilization, must sap their very life blood.²³⁵

Pueblo dances, for example, were targeted by government officials specifically because of their erotic expression.²³⁶ The Hopi Snake dance shocked Protestant missionaries so much that the

²³¹ *Id.* at 788.

²³² Dussias, *supra* note 170, at 788 (quoting SEC'Y OF THE INTERIOR, ANNUAL REPORT X (1883) (referring to Native American religions)).

²³³ *Id.* at 788-89.

²³⁴ *See id.* at 790-91.

²³⁵ COMM. OF INDIAN AFFAIRS, ANNUAL REPORT 5 (1882).

²³⁶ Dussias, *supra* note 170, at 800.

official report was kept out of public circulation in a file dubbed "Secret Dance File" because it described "the most depraved and immoral practices."²³⁷ When Alfred Kroeber asked for a copy of the file, the Protestant organization in possession of it declared that it was too obscene to be transported via the United States Postal Service.²³⁸ Pueblos who were eventually able to read the "Secret Dance File" contended that it was entirely false, even libelous.²³⁹

Government agents persuaded Native Americans to give up their ceremonial dances by threatening to withhold food rations, doling out punishments, or even using force.²⁴⁰ One of the main targets was the Lakota Sioux's Ghost Dance.²⁴¹ The Ghost Dance was a relatively new practice that incorporated teachings similar to the Ten Commandments into a tribal dance that apparently looked pagan and frightening to uneducated European observers.²⁴² In an attempt to suppress the Ghost Dance, the federal government sent troops to Sioux lands in 1890.²⁴³ The United States Army, in an attempt to arrest Ghost Dance leaders, killed the Sioux Chief, Sitting Bull.²⁴⁴ The Army's attempt to suppress the dances culminated in the massacre of around 300 Sioux men, women, and children near Wounded Knee Creek on the Pine Ridge Reservation in South Dakota.²⁴⁵ This accomplished the federal government's mission of suppressing the Ghost Dance.²⁴⁶

By 1921 the Bureau of Indian Affairs reported that Native American ceremonial dances were on the decline.²⁴⁷ When the federal government in the 1920's finally relented and allowed

²³⁷ *Id.* at 801.

²³⁸ *Id.* at 801-02.

²³⁹ *Id.* at 804.

²⁴⁰ *Id.* at 791.

²⁴¹ *See id.* at 794-96.

²⁴² *See id.*

²⁴³ *Id.* at 797.

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 797-98.

²⁴⁶ *Id.* at 799.

²⁴⁷ *Id.* at 802.

ceremonial dances, it imposed severe restrictions, such as only allowing tribe members over fifty to be present.²⁴⁸

***C. Attempts to Protect and Reclaim Religious Practices
through Litigation***

Recently, Native American individuals and tribes have attempted to use the Constitutions' religious freedom guarantees to protect the cultural traditions that they have been able to maintain in spite of the government's Christianization and assimilation policies. Their attempts, however, have not been very successful. Since the *Johnson* decision, federal courts have addressed numerous cases in which Native Americans' freedom of religion came into conflict with property rights, and property rights always won.²⁴⁹ These cases arose when Native Americans attempted to block construction, development, or mining on lands that the tribe no longer held title to but had historically been sacred to their people.²⁵⁰ The federal courts made it successively more difficult for tribes to enjoin such land uses based on their religious practices.²⁵¹

In some cases, the federal courts warned that granting the tribes' claims with respect to public lands would effectively establish "religious shrine[s]" and run afoul of the Establishment Clause.²⁵² Remember that the Establishment Clause did not

²⁴⁸ *Id.* at 803.

²⁴⁹ See generally *id.* at 825-34.

²⁵⁰ See generally *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988); *United States v. Means*, 858 F.2d 404 (8th Cir. 1988), *cert. denied*, 492 U.S. 910 (1989); *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 956 (1983); *Sequoyah v. Tenn. Valley Authority*, 620 F.2d 1159, (6th Cir. 1980); *Havasupai Tribe v. Robertson*, 943 F.2d 32 (9th Cir. 1991) (*per curiam*); *Havasupai Tribe v. United States*, 752 F. Supp. 1471 (D. Ariz. 1990), *aff'd sub nom*; *Manybeads v. United States*, 730 F. Supp. 1515 (D. Ariz. 1989); *Crow v. Gullet*, 541 F. Supp. 785 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir. 1983) (*per curiam*). See also Dussias, *supra* note 170, at 825-34.

²⁵¹ See *supra* notes 249-250 and accompanying text.

²⁵² *Bandoni v. Higginson*, 638 F.2d 172, 179 (10th Cir. 1980). See generally *Wilson*, 708 F.2d at 747; *Inupiat Community of the Arctic Slope v. United States*, 548 F. Supp. 182 (D. Alaska 1982), *aff'd*, 746 F.2d 570 (9th Cir. 1984)

protect Native Americans from federally-funded parochial schools in their territories, or federal regulations mandating Sunday school attendance, both of which were imposed on them in the 1800's through the early 1900's.²⁵³

In one case, the Supreme Court explained that allowing the Native Americans' religious-based property ownership claim would "easily require de facto beneficial ownership of some rather spacious tracts of public property."²⁵⁴ This seems like a particularly hypocritical fear for the Supreme Court to express, given that those "rather spacious tracts" became "public property" by operation of the Supreme Court's dubious *Johnson* jurisprudence.²⁵⁵

Free Exercise jurisprudence also failed to protect Native Americans' educational interests. After the federal government pulled funding for officially sectarian schools, the Catholic Church continued to operate its missionary functions on reservations, and planned to use treaty funds and land cessation funds to finance these operations.²⁵⁶ When Native Americans tried to keep the Catholic Church from appropriating these tribal funds, the Supreme Court denied their request, stating: "It may fairly be said that leaving accommodation [of religious practices] to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that [is an] unavoidable consequence of democratic government" ²⁵⁷ After Native Americans lost their land to the judicial process and had their religious and cultural practices attacked through the political process, the modern judiciary told

(per curiam); *United States v. Means*, 627 F. Supp. 247 (D.S.D. 1985), *rev'd* 858 F.2d 404 (8th Cir. 1988); *Crow*, 541 F. Supp. at 791; *Dussias*, *supra* note 170, at 847-50.

²⁵³ See *Dussias*, *supra* note 170, at 786-87. See also *supra* Part II.B.2.

²⁵⁴ *Lyng*, 485 U.S. at 453.

²⁵⁵ See *id.*; see generally *Johnson*, 21 U.S. at 543; see also *Dussias*, *supra* note 170, at 833.

²⁵⁶ *Dussias*, *supra* note 170, at 785.

²⁵⁷ *Id.* at 805 (quoting *Employment Div. Dep't of Human Res. v. Smith*, 494 U.S. 872, 890 (1990)).

them they would have to resort to the political process to protect what was left of their religious heritage.

In *Quick Bear v. Leupp*, the Supreme Court addressed the free exercise of Native American religion by upholding the Bureau of Catholic Indian Missions' right to use Rosebud Sioux funds to support its sectarian schools.²⁵⁸ "[I]t seems inconceivable that Congress should have intended to prohibit [Indians] from receiving religious education at their own cost if they so desire it; such an intent would be one to prohibit the free exercise of religion amongst the Indians."²⁵⁹ The *Quick Bear* decision enforced the right to practice Catholicism rather than Protestantism but not the right to practice a traditional Native American religion.²⁶⁰

Native Americans' religious-freedom lawsuits have frequently run into trouble overcoming the courts' threshold inquiry: is the practice religious or merely cultural in nature?²⁶¹ The practices that Native Americans seek to protect have repeatedly been deemed merely cultural.²⁶² The exclusion of Native American cultural practices seems contrary to the Supreme Court's determination in *Wisconsin v. Yoder* that the Amish lifestyle could be protected as religious practice if it was "inseparable and interdependent" with their religious beliefs.²⁶³

To summarize this cursory overview of Native American jurisprudence is a practice in ironic dissonance. Native Americans' cultural practices, including their dances, were once outlawed because they were seen as antithetical to their Christianization and eventual assimilation into western culture, but now Native Americans' cultural practices do not get constitutional protection because they are merely cultural. Native Americans were unable to prohibit the use of tribal funds to support Catholic

²⁵⁸ Dussias, *supra* note 170, at 785–86.

²⁵⁹ *Quick Bear v. Leupp*, 210 U.S. 50, 82 (1908).

²⁶⁰ Dussias, *supra* note 170, at 786.

²⁶¹ *See id.* at 806–09.

²⁶² *See id.*

²⁶³ *Wisconsin v. Yoder*, 406 U.S. 205, 215–207 (1972); *see also* Dussias, *supra* note 170, at 809.

schools, and they were unable to choose secular schools or ones that taught their own religious beliefs. Native Americans lost their lands due to the discovery doctrine, and now they cannot protect their ancestral homelands because to do so would give them *de facto* ownership of what are now *federal* lands.

IV. CONCLUSION

Native Americans' many attempts to reclaim their culture and religion through judicial and legislative processes have been entirely unsuccessful. Given this history, it is not surprising that tribal leaders reacted to the marriage of Reynolds and McKinley as though their culture was under attack, even though a same-sex marriage is entirely consistent with Native American traditions. Reynolds and McKinley have always maintained that their marriage was never supposed to be an activist gesture; they got married because McKinley was not allowed to visit Reynolds when she had been hospitalized in 2003.²⁶⁴

The current cultural conditions and tribe members' impressions of their own cultural heritage are at odds with anthropological accounts of North America's historical cultures. The United States' legal system has outlawed or belittled facets of tribal culture that anthropologists identify as crucial to the Native Americans' gender systems. The result is that a cultural space, where same-sex couples and gender non-conformity once would have been welcomed, is hostile towards a couple that does not fit the traditional Christian gender norm.

This transformation of tribal values might not have happened absent the interference of Judeo-Christian lawmakers. Federal and state laws targeted important aspects of Native American culture, a culture based on a gender system that accepted non-conformity more readily than Western societies.

Productive work was important to the Native American gender system, but federal and state laws stripped away property rights and forced tribal communities to adopt European eco-

²⁶⁴ Kurt, *supra* note 9, at 14A.

nomie systems. Traditional attire was important as well, but United States laws encouraged or required western-style dress in parochial schools. The *Alyha* and *Hwame* traditions were rooted in Native American religious teachings, and the government spent eighty years officially Christianizing the Native American population. The federal government even outlawed specific ceremonies that diverged too greatly from Christian values. The *Alyha* and *Hwame* identities were celebrated and confirmed through such ceremonies.

At the very least, the legal system did not *protect* the Native American tribes' perspective on gender, marriage, and same-sex relationships. More likely, the judiciary's systematic rejection of Native American rights, coupled with the legislative and executive branches' zealous pursuit of tribal Christianization and assimilation, contributed to the radical transformation of tribal values.

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